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Citizens and Consumers: Discursive debates during and after the Communications Act 2003

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Abstract

The regulation of media and communications in the UK has recently been subject to reform resulting in the creation of the Office of Communications (Ofcom). This statutory body, established by an Act of Parliament, is a new, sector wide regulator, protecting the interests of what has been termed the 'citizen-consumer'. This article charts the discursive shifts that occurred during the passage of the Communications Act through Parliament and in the initial stages of its implementation to understand how and why the term 'citizen-consumer' came to lie at the heart of the new regulator's mission. By critically analysing the various alignments of 'citizen' and 'consumer' interests within the debates, the underlying struggles over the formulation of power, responsibility and duties for the new regulator and for other stakeholders – industry, government and public – are identified. The article concludes by suggesting that the legacy of these debates is that the regulatory provisions in place to further the 'citizen interest' are inherently dilemmatic.

'Ofcom exists to further the interests of citizen-consumers through a regulatory regime which, where appropriate, encourages competition.'

Analysing regulatory change: the case of the communications sector

The above mission statement hangs in the entrance lobby of the Office of Communications (Ofcom), the 'super-regulator' formed by converging five legacy regulators following the Communications Act 2003.¹ The intent behind this huge Act, with its long gestation and substantial public consultation, was ambitious. Each legacy regulator² had conducted its relations with the government, industry and the public in distinct ways (Collins and Murrone, 1996). However, notwithstanding the continued existence of additional communication regulators and the restrictions on regulating the internet, Ofcom was conceived as a powerful sector-wide regulator that could flexibly respond to new challenges while being 'future proofed' against changes that could otherwise destabilise or impede technological innovation and market expansion.

With powers and duties defined by the Act, Ofcom was established to manage the relationship between content and carriage, products and services, commercial and public service broadcasting (PSB). In this vein, it has developed a common approach to broadcasting, spectrum and telecommunications, with a view to enabling both convergence and diversification. Similar changes in governance are taking place internationally and across other sectors (Chapman et al. 2003; Hall et al. 2000; Black, 2002): Ofcom provides a potentially influential model in the regulation of an increasingly globalised and localised industry (Lodge, 2000). As we outline below, the convergence-diversity agenda was encapsulated in the moves to place the 'citizen-consumer' at the heart of a new regulatory regime. As part of a broader research project exploring changing styles of governance in 'risk society' (Lunt et al. 2005; 2006), this article focuses on several key questions: how was the term 'citizen-consumer' conceived and what does it mean? Can the interests of the citizen-consumer be furthered through encouraging market competition? What is meant by 'citizen interests?' Or does Ofcom reveal, in its very mission statement, a fundamental ambivalence regarding the interests to be served by its activities?

Such an overtly terminological debate invites a discursive analysis. Our starting point is to ask how and why an established semantic terrain of everyday terms – ‘audiences’, ‘listeners’ and ‘viewers’ for broadcasting, ‘consumers’ or ‘customers’ of telecommunications services, concerns over ‘publics’ and the ‘public interest’ and, more recently, the awkward ‘users’ or ‘end-users’ of computing and information services - has been neatly tidied into just two words (Livingstone, 2005; Syvertsen, 2004). Our method is to offer a close reading of the use of terms that define ‘the public’ in documents – speeches, policy statements, political debates – in order to understand the ideological and practical dilemmas that beset regulation and governance (Billig et al., 1988). To structure our analysis, we follow the narrative of the passing of the Communications Act 2003, focusing on the clause that set out the general duties of Ofcom.

Theoretical considerations

The terms ‘citizen’ and ‘consumer’ have become widespread in contemporary political and public discourse, shaping the debates over the passing of the Communications Act 2003. Even within media and communication theory, critical research has long sought to destabilise assumptions about audiences in terms of their supposed apathy and passivity (cf. active audiences), their low tastes (popular vs. elite audiences), their normativity (mainstream vs. critical or resistant audiences) and their exploitability (as in ‘desperately seeking the audience’) (Ang, 1990; Smythe, 1984). Although this research seems to have achieved little resonance beyond the academy, the widespread semantic difficulty in addressing people’s collective relation to new media in everyday language (audiences? users? see Livingstone, 2004) suggests a simple reason for the ready adoption of ‘citizens and consumers’ in public and policy discussion.

However, there are some more fundamental reasons why the term ‘citizen-consumer’, although argued by critics to be an oxymoron (Campbell, 2004), has become prevalent within political discourse, with mainstream parties variously co-opting both ‘citizen’ and, more recently, ‘consumer’, in ways that suit their strategic interests (Needham, 2003; Clarke et al., in press). Social and cultural theorists analysing newly emerging forms of governance seek to problematise references to ‘the public’ in official discourses, claiming that the nature of regulation is changing in contemporary liberal democracies, from a hierarchical ‘command and control’ approach prioritising monitoring,

compliance and enforcement of legally-based property rights, to a more public-facing, self-regulatory approach prioritising 'decentred' (Black, 2002), networked and discursive governance (Scott, 2001; Chapman et al. 2003; Hall et al. 2000).

Governmentality theorists argue that instead of the law gaining its power through legitimation, there is a broader discursive and social formation at work. This invites an analysis of the diverse range of regulatory practices by which social control is sought through the deployment of devices for gathering intelligence, establishing standards, applying categories, and monitoring effects as well as enforcement. One outcome of these regulatory changes is a prioritisation of the 'governed self' (Foucault, 1977), the argument that identity has become self-regulating in accordance with late modern trends towards individualisation, consumer culture, decentralised administration, declining support for the welfare state and the loosening of ties of social obligation (Rose, 1999; Giddens, 1998; Beck and Beck-Gernsheim, 2002; Clarke et al., in press). This replaces centralised forms of control, and whilst promising individual freedom, defines it in particular ways. Whereas once, the good 'citizen' was defined in terms of active participation in public life, the merging of this term with 'consumer' constructs a different meaning of civic life. This discourse has become dominant in New Labour in the UK in the 1990s. Needham (2003) argues that by treating citizens as consumers, the Government is:

'replicating patterns of choice and power found in the private economy. The consumer is primarily self-regarding, forms preferences without reference to others, and acts through a series of instrumental, temporary bilateral relationships. Accountability is secured by competition and complaint, and power exercised through aggregate signalling.' (Needham, 2003, p. 5)

Although Ofcom is a centralised conglomeration of previous bodies, raising concerns about the concentration of power (Freedman, 2005), it also seems in many respects to be a prime candidate for a governmentality analysis. In broadcasting regulation, the previous discourse of audiences and publics divided the domain of commercial and public service broadcasters. During the 1990s, two problems were attracting growing attention. First, the notion of 'commercial public service broadcasters' elided 'audience' with 'public' in policy regarding the structure, funding and regulation of ITV and C4, neither of which, Ofcom (2004) has

since argued, can easily afford PSB obligations in the future. Second, the growing power of the BBC, especially but not only with respect to its non-broadcasting activities, was seen to distort the market. Add this to the chorus of voices questioning the funding for PSB, the fragmentation of what was once a common (national) voice, an increasing reliance on individual (rather than industry or regulator) responsibility for services accessed, uncertainties over the viability of platform-specific regulation in an age of convergence, and an overt prioritisation of the sovereign consumer - and it seemed clear that broadcasting regulation required a major rethinking (Born, 2005; Hesmondhalgh, 2005; Murdock, 2005). Similarly in telecommunications, as Hall et al's (2000) study of Ofcom documents suggests, we have witnessed a decades-long history of the gradual dismantling of one of the pillars of the post-war consensus--namely public ownership of the telecommunications infrastructure (as for broadcasting content), resulting in an increasingly deregulated and privatised market (see also Collins and Murrone, 1996). Further, where the previous communications landscape was divided between content providers and content carriers through the 1990s, this line became ever more blurred, with carriers producing content and new business models that either combined both or added to an increasingly complex value chain (Currie, 2005).

It is in this context that debates about 'citizens' and 'consumers' have emerged. We ask whether these two terms are really being merged, or if 'consumer' taking over from 'citizen' in the communications sector, as suggested by the ubiquitous discourse of choice and empowerment. The critical concern, in short, is whether the citizen has a voice in regulatory debates, or whether this voice being subordinated to the market. The two are clearly in tension, as the regulator itself acknowledges:

'[In a] very different and more converged world... as regulators and policy makers we need to radically adapt the way we think about the communications sector ... We will have to learn to rely more on markets than ever before. And we need to rely more on individual consumers and on companies exercising responsibility in those markets, with increasing emphasis on self-regulation and co-regulation.' (Foster, 2005)

Whether conceived as citizens or consumers, audiences or users, customers or communities, there is growing momentum behind the argument that ordinary people are being – and must be

– repositioned, by technology, the market, society and, hence, by the regulator. As David Currie, Chair of Ofcom, says, ‘consumers are demanding access to any service, any time and anywhere’, for ‘the digital era is shifting the balance of control towards consumers’ (Currie, 2005). Ofcom’s Chief Executive reiterates the point:

‘... today our viewers and listeners are far more empowered. Digital television, the internet and increasingly broadband is putting more choice in the hands of the user. As a regulator, we will reflect that, welcome and encourage it. there can no longer be a place for a regulator ... determining what people “ought” to have.’ (Carter, 2003a)

In what follows, we will suggest that a two stage discursive process has occurred. The first, occurring between 1998 and culminating in the 2003 Communications Act, was the struggle to resolve a plethora of everyday notions of ‘the public’ into ‘citizen’ and ‘consumer’, two distinct terms that supposedly divide the semantic terrain neatly between them, closing down previous ambiguities and reframing the regulatory domain so that conflicting interests can be accommodated. The second, still ongoing and so merely sketched in this paper, is the almost immediate unravelling of the two-term solution, as ambiguities re-emerge and boundary disputes problematise proposed regulation, requiring remedial action of various kinds on the part of the regulator and others.

Stage one: citizens and consumers as the solution

Faced with multiple and overlapping regulators in a context of technological and market convergence, support for a single regulator for the communications sector grew during the 1990s (Collins and Murrioni, 1996). Yet in the late 1990s, the Government still sought a moderate rather than a radical solution.

The Green Paper (DTI/DCMS, 1998)

As its executive summary stated, despite far-reaching technological changes, ‘the public policy objectives which underpin regulation will remain largely the same’. The Green Paper prioritised serving the consumer interest; supporting universal access to services at affordable cost; securing effective competition; and promoting quality, plurality, diversity and choice. Aiming to maintain existing policy objectives, and confident that ‘the behaviour and expectations of consumers will not change overnight’, consumer behaviour being conservative (Neuman,

1991; Webster, 2005), the Green Paper favoured an 'evolutionary approach' that would perpetuate and adapt the existing regulatory framework. After all, 'mass markets for digital services do not yet exist ... [and] how they develop depends on the behaviour of individuals and communities reacting to new technology and services' (executive summary). But as responses to the consultation on the Green paper and the pace of change made clear, more radical measures were needed.³

The Communications White Paper (12/12/2000)

Jointly proposed by Stephen Byers, Secretary of State for Trade and Industry, and Chris Smith, Secretary of State for Culture, Media and Sport, The White Paper acknowledged that 'the communications revolution has arrived' and so 'sets out a new framework for communications regulation in the 21st century' (Foreword) in the form of the Office of Communications (Ofcom). Its three central objectives, as set out in the Executive Summary are listed below:

'Protecting the interests of consumers in terms of choice, price, quality of service and value for money, in particular through promoting open and competitive markets;

'Maintaining high quality of content, a wide range of programming and plurality of public expression;

'Protecting the interests of citizens by maintaining accepted community standards in content, balancing freedom of speech against the need to protect against potentially offensive or harmful material, and ensuring appropriate protection of fairness and privacy.'

The values embraced by the new regulatory framework were apportioned across three terms used for the individual – the consumer, the public and the citizen. Consumers' interests centred on choice and value for money, to be met by promoting market competition. The public was linked to public service, and their interests are to be met through positive regulation ('regulation for'; Corner, 2004). Citizens, not mentioned in the Green Paper, were linked to community, for which the values of fairness, freedom of expression, privacy and protection against harm are to be met through negative regulation ('regulation against'). To achieve these objectives, the White Paper proposed two bodies – an independent Consumer Panel to further consumer interests where

not met by the market and, within Ofcom, a Content Board to ensure citizen interests are met in relation to broadcast content.

Public consultation on the White Paper (12/2/2001)⁴

Responses to the White Paper, from over 252 organisations and individuals, raised many still-pertinent issues regarding Ofcom's activities, pinpointing underlying difficulties in defining consumer and citizen interests. These issues included:

Private sector vs. public sector values. The balance of industry goals against social ideals of access, diversity, plurality, especially as expressed by civil society groups and commonly linked to discussion of PSB.

Regulation vs. deregulation. Expanding (content) regulation (or 'regulatory creep') as a threat to freedom of expression and an inhibiting of markets.

Consumer protection vs. market competition. Here industry argued for market competition, some arguing that the Consumer Panel would unnecessarily reproduce the work of consumer groups, while consumer representatives were concerned that consumer interests cannot be safeguarded simply through the pursuit of competitive markets.

Citizens vs. consumers. Proposals for an independent body to ensure citizen interests (seen as quality, accuracy and impartiality in broadcast content) to complement the Consumer Panel (though some were concerned over the normative – i.e. consumer-led - definition of 'generally accepted community standards').

Prospects for convergence. Various responses considered the relation between Ofcom and other regulators/self-regulators (e.g. comparing how citizens' interests are regulated in relation to print and film), in order to harmonise regulatory regimes with future convergence.

The Draft Communications Bill (DTI/DCMS, 2002a)

Following this lively consultation, the draft Bill marked a surprising linguistic shift. It replaced the language of 'consumer'

and 'citizen' with that of 'customer' throughout, this suggesting pressure from the industry and/or Oftel during the drafting process (although other terms are used occasionally - citizens, members of the public, end-users). The objectives in the White Paper were rewritten thus:

'Part 1: Functions of Ofcom

3(1) (a) to further the interests of the persons who are customers for the services and facilities in relation to which Ofcom have functions

3(7) "customers" means (a) a person to whom or for whose benefit that service or facility is provided or made available... (b) a person who is sought as a customer...; (c) a person who wishes to be such a customer or who is likely to seek to become one'

Although Para 3(7) sought to ensure that those not already in a contractual relation with a service provider are, nonetheless, 'customers', the point was not accepted by either public bodies or politicians, as the public consultation made clear. The draft Bill also revealed that, as Jocelyn Hay (2002) put it, 'the customers referred to ...are not the individual members of the audience, nor family groups, but the advertisers who have to be provided with the right audiences to enable the companies to deliver maximum profits to their shareholders'. Indeed, throughout the passage of the Bill, concerns were expressed over the meaning of both 'customer' and 'consumer', for while commonly understood as referring to private individuals, the intention was often to refer to business consumers. Most noteworthy is the definition of customer (or consumer) interests in the draft Bill as those concerned with choice, price, quality of service and value for money, apparently excluding the citizen interests made salient in the White Paper. Thus, the linguistic shift appears to signal the more fundamental agenda of forming Ofcom solely as an economic regulator.

Public consultation on the Draft Bill (2/8/2002)⁵

Submissions following the draft Bill came from over 300 organisations and individuals, with Clause 3 (General duties of Ofcom) attracting highly polarised comments over citizen and consumer interest. Some were content with the term 'customer', wishing to consolidate Ofcom as an economic regulator. Indeed, the Confederation of British Industry's submission, using the

language of 'customer' and 'consumer' interchangeably, argued for an Economics Panel or Competition Board 'complementing the role of the Consumer Panel' and providing 'an explicit business voice in regulation'.⁶ For the CBI, customers' interests are to be met 'primarily by promoting market sustainability'.

Others were far from content. The ITC quibbled with the term, arguing that 'audiences' cannot be adequately described as 'customers' since, first, they receive free-to-air public service networks and, second, 'they are members of the public as citizens'.⁷ Similarly, the National Consumer Council submission, under the heading 'getting the terms right', expressed concern that 'customers' is too focused on existing customers and on contractual relations, excluding potential customers and other household members (NCC, 2002). They added that access, fairness, redress and information are 'equally important for consumers' interests', these issues often identified as citizen interests.

The Report of the Joint Select Committee on the Draft Communications Bill (25/7/2002)

A decisive intervention into these deliberations came through pre-legislative scrutiny of the Bill, conducted by the Joint Select Committee for the House of Commons and House of Lords-- an all party committee chaired by Lord Puttnam. This heard a considerable body of evidence from diverse stakeholders in response to the Draft Bill, focusing on citizen and consumer interests, the independence of the Consumer Panel and the role of the Content Board. In addition to industry and regulator views, one argument for 'citizen interests' came from the civil society groups who had established a coordinating organisation, Public Voice, during the passage of the Bill. Pressure also came from a cross-party alliance between the opposition Conservatives and Liberal Democrats (Harvey, 2006).

Although broadly supportive of the economic case for a communications regulator, the report argued against an Economics Panel to balance the Consumer Panel and Content Board, as proposed by industry, 'because it was felt that consumers found it very difficult to get into the regulatory process, certainly far more difficult than the industry'. In other words, the Consumer Panel (indeed, Ofcom's) purpose was to realign the already unbalanced representation of consumer versus industry interests. Further, the Joint Committee report supported claims

that the draft Bill downplayed consumer and citizen interests through portraying them as 'customers', and argued 'the need for a broad understanding' of 'consumer' (p.103). Crucially, arguing that media are influential in shaping society, requiring regulation precisely because they are not reducible to a tradeable commodity (Corner, 2004), the report criticised the omission of citizens' interests from the Draft Bill.⁸

The report advocated two principal duties for Ofcom: to further the interests of citizens and to further the interests of consumers. It noted that Tessa Jowell, then Secretary of State, Media, Culture and Sport, had indicated that she would accept these joint duties if the Joint Committee could offer an 'elegant' phrasing – which it did. Yet this did not appear in the Bill that followed. However, in its response to the Joint Committee, the Government acknowledged explicitly the terminological muddle impeding the passage of the Bill, issuing a note to the Joint Committee thus:

"customer" is used throughout the [draft] Bill to refer to individuals or businesses who use or seek to use electronic communications networks and services or associated facilities, or whom providers seek as users of those things ... [the only exceptions being that] clause 248 uses consumer in applying concurrency under the Fair Trading Act and clause 4(5) uses the term "citizen" in implementing the EU Directives.' (DTI/DCMS, 2002b)

The note adds, somewhat cryptically, that the Consumer Panel is so called because 'this will be more meaningful' to 'customers'. It also notes, inconsistently, that in the policy document accompanying the draft Bill, the Government followed the approach of the White Paper rather than the draft Bill itself: there 'we have generally used the terms 'consumer' or 'citizen' rather than 'customer' when talking about interest of members of the public', because:

'generally the term "consumer" is used to indicate the purchaser or other user of a service, normally based on an economic relationship (either direct or indirect) between the individual and the service in question. Typically, though not exclusively, such interests arise in relation to networks and services rather than content. Meanwhile, the term "citizen" relates to the individual as a member of society, and enjoying the rights and responsibilities such membership confers. In the electronic communications sector, these tend to arise

mainly in the content area, where more cultural aspects, such as harm and offence, access to a wide variety of high quality programming, and the handling of political issues assume importance'. (DTI/DCMS, 2002b)

This clarified Government thinking by mapping categories of the public onto areas for regulation and the institutional bodies to regulate them, thus revealing how discursive categories instantiate power relations among state, industry and individuals:

<u>Consumer interest</u>	<u>Citizen interest</u>
Economic focus	Cultural focus
Networks and services	Content
Individuals	Community
Consumer Panel	Content Board
Legacy: Oftel	Legacy: ITC, BSC

The Communications Bill (11/2002)⁹

The Communications Bill was introduced in the House of Commons on 19th November 2002. Clause 3 of the Bill (General duties of Ofcom) stated simply:

'(a) to further the interests of consumers in relevant markets, where appropriate by promoting competition'

Several points are noteworthy. First, the shift from 'customer' in the draft Bill to 'consumer' in the Bill responded to the Joint Committee, making it clear that 'those who were not in receipt of services or unable to access them' were included (House of Commons, 2002, p.13). This paved the way for the future focus on social inclusion (e.g. in relation to the universal service obligation). However, this consumer interest is clearly linked to a belief that the market is the best place to meet consumer interests via competition. Second, the Government agreed with the Joint Committee that Ofcom should include a Consumer Panel but not an Economic Panel (House of Commons, 2002, p.19). The thinking behind the Consumer Panel, modelled on the Consumer Panel of the Financial Services Authority (though without following the FSA in its Industry Panel), was described thus:

'The Consumer Panel should be the conscience, not the creature, of OFCOM. It will have a vital role in providing OFCOM, and other relevant bodies, with advice on the interests of consumers... it will be expected to provide a

counter-weight to advice and lobbying from the corporate sector.'

However, third and most important, Clause 3 asserted a singular objective, stating nothing about citizens, notwithstanding the recommendation of the Joint Committee. As Jocelyn Hay, Chair of the Voice of the Listener and Viewer, commented acidly (Hay, 2002):

'... the Bill ignores the public in their role as citizens... This is a slight improvement on the draft Bill in which the term consumer was only used in the title of the Consumer Panel, but where everywhere else listeners and viewers were referred to and treated as customers, a quite different kind of relationship based on a commercial transaction. The continuing lack of recognition of "citizens" and the public interest in broadcasting is, sadly, symbolic of a piece of legislation almost wholly concerned with the interests of commerce, for which members of the public are customers and consumers, not citizens... The Bill simply re-iterates a, now largely discredited, faith that the "market" and competition will provide choice and quality; it does NOT as experience shows.'

Possibly, to have included the term 'citizen' would have fit poorly with consumer focus of contemporary political discourse. However, the Government had received legal advice that legislation cannot use the term 'citizen' to mean 'all members of the public in the United Kingdom' since this would conflict with its narrower use in relation to nationality. The Government argued that citizens' interests were already sufficiently represented in the Bill as part of (and as not extending beyond) the formulation of Public Service Broadcasting obligations, and required no explicit statement of inclusion.

The House of Lords' Debate on the Communications Bill (23/6/2003)¹⁰

Although a new clause was added, proposing that Ofcom should act to further the interests of 'the community as a whole', the question of 'the citizen' came to a head in June 2003, when the Bill reached the Lords. Lord Puttnam proposed an amendment to Clause 3, reiterating the phrasing of the Joint Committee report that Ofcom should (a) further the interests of citizens and (b) further the interests of consumers. There followed a lively debate over the meaning of these terms, and over whether the Bill should

specify how Ofcom should approach conflicts between these interests or whether matters should be left to Ofcom's discretion. Lord McNally argued against leaving citizen interests to the market:

'The pre-legislative scrutiny committee came to the conclusion that, although many of the Bill's proposals to inject vigorous competition into the industry were welcome, there was a need for balance that did not and would not exist unless responsibilities were laid down in the specific duties of Ofcom to protect the rights of the citizen... the very reason we have a Communications Bill rather than leaving matters simply to competition and enterprise legislation is that communications is different.'

Baroness Howe supported this, but linked 'the "public (the citizen) interest"' more narrowly to PSB, noting 'the growing recognition that what is distinctive about British broadcasting, contributing to its original and continuing pre-eminence globally, is the enshrined concept of public service broadcasting'. Speaking for the Government, Lord Borrie agreed but observed simply that the amendment was unnecessary since the Bill already required Ofcom to 'go beyond economic concerns':

'the main argument for these amendments combined is to ensure that Ofcom will have concern not only for the economic considerations of the interests of the consumer and the way that competition can assist the consumer but also for the interests of the individual—the citizen, if one likes to call him that—in terms of the quality of what is provided and especially in terms of the public service obligations.'

Such faith was tested by those who asked how Ofcom would respond when market and citizen interests were in conflict. Those in favour of the amendment sought to ensure that Ofcom had 'an unambiguous basis' on which to resolve what could otherwise be an 'extremely uncomfortable position'. While Lord McIntosh attempted to reframe 'unambiguous' as 'inflexible', urging flexibility in the phrasing of the Bill, Lord Peyton countered thus:

'I believe the Government must be well aware that the forces of the market are such that 99 times out of 100 the real pressure of short-term demands, with the full support of the media moguls, would be more than sufficient to win the day. Supporters of the amendment fear that that

position will be infinitely weakened by the pressures that the market and those who control the media - the moguls of television and other media - will be able to marshal against it.

'The consumer and the citizen are two sides of the same coin. All of us are both from time to time, but the consumer will almost always take a short-term point of view. In our time, we badly need reinforcement for the long-term view.'

Here the long-term view was now aligned with 'the citizen' rather than 'the market'. All agreed, however, that consumers are problematically short-termist, requiring regulation to ensure their immediate choices are not damaging in the long-term. Lord Peyton's view received considerable support. Lord Bragg noted:

'I hope that your Lordships will fully support and champion that fine word and state of "citizen". It has a lengthy and distinguished pedigree.'

Also in support, Baroness Buscombe quoted John Whittingdale, Shadow Secretary of State for Culture, who:

'questioned whether only the interests of consumers should be given primacy or whether that should be extended further to cover the interests of citizens more generally. He gave the example of public service broadcasting, which, as he noted, is in the national interest, although only some may wish to consume it.'

Thus she again referred to PSB, now linked to nationality as the collective level ('the national interest'), and she proceeded to link promoting citizens' interests and promoting the national interest, so strengthening civil society - 'the community as a whole' – in terms of its rights and responsibilities.

Lord Currie, Chairman of Ofcom, added his voice, unsurprisingly, to those who wished to leave matters to Ofcom's discretion, pointing out that 'the dual concept of the citizen/consumer' was widely supported within Ofcom, and that Ofcom would recognise this whether or not the amendment was accepted (note that he here introduced the hyphenation of the terms that later became Ofcom's mission statement, though this does not appear elsewhere during the passage of the Bill). He observed that one of Ofcom's first tasks would be the PSB review, taking forward the citizen interest:

'These issues are fundamental to the role of the citizen: plurality, impartiality, high quality, diversity, and effective support for democratic discourse are critical outputs of our society.'

Seizing upon this useful specification of the citizen interest, Lord Peyton asked him to agree, which Lord Currie then did, that:

'... the concept of citizen is fundamentally different from that of consumer?'

Scenting danger, Lord McIntosh intervened for the Government, rejecting the term 'citizen' for its legal emphasis on being a member of a nation-state and defending the extension of Ofcom's duties to include furthering the interests of the community as a whole. To fend off further amendments, he asserted that consumer and citizen 'are two sides of the same coin':

'It is not our intention—nor is it in the English language—to equate consumers with markets. The word that I have always used, in 50 years with the Labour Party, is that we have to be on the side of the "punters". I think everyone understands that... "Consumers" is not a doppelganger for the wicked and self-seeking market, which some people in the Chamber seem to fear.'

As he further suggested of 'community as a whole', 'Politically, it means the same as "citizen" is often taken to mean in non-legal contexts'. Thus he suggests, 'we need to put beyond doubt that the content board will act in the interests of the community as a whole'. McIntosh added:

'Although all consumers are members of the community as a whole, not all members of the community as a whole are consumers of telecommunications services. For that reason, one has to cover both.'

Several Lords interjected at this point, arguing that the Government was prioritising terminological consistency in legislation over the importance of 'putting in a fundamental principle ... related to future workings of the content board' (Lord Pilkington) and, moreover, extending responsibility for promoting the citizen interest beyond the Content Board to Ofcom's Main Board. Puttnam then intervened, isolating the confusing problem of individual vs. collective levels of analysis:

'My Lords, I do not wish to quibble with the Minister over words. However, the word "citizen" can define both the

individual and the collective—whereas the phrase "community as a whole" could simply be a majority of the collective. They are quite different, both in law and as far as concerns Parliament.'

Lord Putnam then called for a vote. The amendment was carried by a substantial majority. And thus the twin terms of citizen and consumer - not the citizen-consumer, nor the consumer-for-which-also-read-citizen, and nor the customer - made it through the legislative process. Each individual is, under this settlement, both a citizen and a consumer, and the two are asserted as distinct rather than as 'two sides of the same coin'.

The Communications Act (17/7/2003)¹¹

The Communications Bill was extensively scrutinised in both Houses, before receiving Royal Assent on 17th July 2003. Clause 3 of the Communications Act set out Ofcom's Statutory Duties thus:

'3(1) It shall be the principal duty of Ofcom, in carrying out their functions;
(a) to further the interests of citizens in relation to communications matters; and
(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.'

As the Joint Committee had wanted, the two interests are distinct, with the citizen interest put first, and only the consumer interest related to markets and competition. The struggle now apparently over, the two-term settlement made, all waited to see how Ofcom would interpret its duties following its official start in December 2003.

Stage two: citizens and consumers as the problem

We have seen that the discursive formulation of 'citizens' and 'consumers' emerged from a protracted negotiation among multiple stakeholders speaking for a range of interested parties. The second stage of the story is as yet unfinished. However, the most striking change is that the deliberations are, henceforth, dominated by a single voice--that of Ofcom. As Black (2002) argues, the letter of the law is meaningful only through its interpretation. However, as she further emphasises, that interpretation is a collective enterprise, dependent on an

interpretive community. As we show below, Ofcom's voice is challenged both from within as well as, more vocally, from outside.

Ofcom's interpretation of the Act

How does Ofcom interpret its general duties? Just a few days after the Lords' debate, David Currie (2003), Ofcom Chairman, commented with some frustration:

'You may well have noticed that the careful balance established in the Communications Bill between the duties to citizens and those to consumers has been upset by a recent House of Lords amendment, pressed by Lord Puttnam, that requires Ofcom to give paramountcy to the citizen in all matters concerning broadcasting and spectrum. That represents a considerable departure from what has been the case for the two existing broadcasting regulators (the ITC and Radio Authority), who currently work to a balance of these interests. This late change... seems to us to be unfortunate. The law of unintended consequences applies all too often to late legislative changes, and I fear that it may apply with a vengeance to this change, especially in a converging world. What we need is a law which is capable of protecting what we cherish but flexible enough to embrace future change.'

Stephen Carter (2003b), Ofcom's Chief Executive, was equally concerned. Having intended the twinning of citizen and consumer interests as two sides of the same coin, he saw the amendment as, problematically, requiring Ofcom 'to give primacy to the citizen interest at all times in broadcasting'. Even in a speech to civil society, rather than the industry, he does not give an even-handed account of the recent struggle. Jocularly characterising the debates preceding the Communications Act 2003 as a struggle between 'fluffies' and 'techies' (as they had been described during the Lords' debates), he presents the debate as one between:

'those who hoped or feared that Ofcom would approach its tasks wholly through an economic prism and would sweep away anything subjective that could not be encompassed by a market analysis; and those who hoped or feared that Ofcom would give primacy to the cultural and political themes and would intervene subjectively and distortingly into market choices.' (Carter, 2004a)

Carter characterises the 'fluffies' as advocating a subjective distortion of the market, leaving the 'techies' as, presumably,

objective. His working definition of Ofcom's general duties is based on Lord Currie's hyphenated term, 'citizen-consumer' (which does not appear in the Act; Harvey, 2006).

The 'citizen-consumer'

The 'citizen-consumer' formulation, Stephen Carter (2004a) suggests, 'reflects a truth that is at once simple and more complex than the crude characterisations of each side of the debate'. Setting the complexities to one side, he argues that broadcasting depends on the market and that telecommunications must accommodate civic needs. For Ofcom, he says, 'the promotion of civic values must infuse all our actions; economics should be the basic tool which underpins all our actions', a formulation in which civic values may inspire goals, but economic realities will dictate outcomes. The former can be addressed discursively, the latter through policy tools. Hence the term, 'citizen-consumer', is viewed by critics as a means of re-coding the primacy of economic regulation, not so much 'both/and' or 'different but equal' but merged together, with 'citizen' subsumed into 'consumer'. Much of Ofcom's everyday discourse elides the two terms, speaking of citizens-'n'-consumers as a single phrase. As Stephen Carter commented (2003c), before the Act was passed:

'We are all of us both citizens and consumers. In some activities we are more one than the other. But the interests of the citizen-consumer are an integrated whole. To attempt to separate them or rank them would be both artificial and wrong. So it will be against that combined citizen-consumer interest that we will benchmark all our key decisions.'

Where does this leave the distinctiveness of the citizen interest? Lord Currie (2003) defines citizen interests negatively, as that left over when the market has met consumer interests, when he says that the Content Board will:

'... understand, analyse and champion the voices and interests of the viewer, the listener and the citizen... [it] will concern itself with those issues where the consumer interest becomes the citizen interest – beyond pure consumerism.'

More bluntly, when talking to (reassuring) the industry (Currie, 2005), he prioritises the consumer/market focus, saying:

'Let's be clear. Our objective is to create an environment which will help markets to grow; not to stifle innovation.'

In sum, the citizen-consumer formulation asserts the following:

Citizen-consumer

Economic focus, with some cultural focus for anything left out by the market

Networks, services and content together

Individuals (and the aggregate of individuals)

Consumer Panel and Content Board work together, with the Main Board pre-eminent

Legacy regimes harmonised and transcended

Task ahead: to develop the broadcasting market, to accommodate civic needs in telecommunications

Method: favour objective approach, where economics provides the policy tools, and civic values infuse the public (discursive) presentation of the regulator

Returning, to Ofcom's mission statement quoted at the outset (see also Currie, 2003), we can recognise a double elision in the interpretation of its general duties: it conjoins citizen and consumer as the citizen-consumer; and it foregrounds competition as the primary instrument to further both consumer and citizen interests. This positions Ofcom primarily as an economic regulator. For this reason, the confluence of 'citizens' and 'consumers' has been directly contested at several points (e.g. Redding, 2005).

Citizens versus consumers

There is a second, parallel resolution evident in Ofcom's discourse, which defines citizens and consumers as binary opposites. As Ed Richards, Senior Partner, Strategy and Market Developments at Ofcom, put it: 'at the very heart of Ofcom is the duality of the citizen and the consumer' (Richards, 2003). He contrasts the 'consumer' and 'citizen' in broadcasting contexts: consumer rationale is focused on wants and individual choice. In times of scarcity, market intervention was required to maximise the range and balance of content, and this requirement 'will gradually reduce over time' as we enter the digital age of abundance. In a world of consumer preferences expressed through viewing choices, conditional access, subscriptions and pay-per-view options, broadcasting can become more like the publishing, film and music industries, and regulation can recede (Richards, 2004).

The citizen rationale, by contrast, is focused on the benefits broadcasting offers long-term to society (rather than short-term to individuals), bringing 'broader social benefits' to democracy, culture, identity, learning, participation, engagement (Richards, 2004). This is aligned firmly with PSB, whose core purpose is to reflect citizen interests, going 'beyond our interests as private consumers'. He argues that the market can and does deliver some of this though not enough; hence the justification for continued market intervention.

Thus, a binary discourse is reasserted, as follows:

<u>Consumer rationale</u>	<u>Citizen rationale</u>
Wants	Needs
Individual level	Social level
Private benefits	Public/social benefits
Language of choice	Language of rights (inclusion)
Short-term focus	Long-term focus
Regulate against detriment	Regulate for public interest
Plan to roll back regulation	Continued regulation to correct market failure

Mapping the discourse

The binary thinking of the Government, which mapped issues and approaches onto institutional structures, has been reframed by Ofcom as the citizen-consumer formulation, which critics see as risking the subordination of the citizen interest to the consumer interest (Harvey, 2006; Turner, 2001). Underlying this is the polarisation discussed above, which keeps these interests distinct but does not map clearly onto institutional structures or instruments. Part of the difficulty for Ofcom is that the various binary terms mapped onto 'citizen' and 'consumer' in the above formulation do not, in practice, align in neat columns. Nor do they map clearly onto Ofcom's specific policy tasks, or its available policy tools.

Partly, the interpretative flexibility of these terms rests on the instability of those on which they rely – needs, preferences, value, choice. But the oppositions are unstable because 'citizen' and 'consumer' have emerged as a discursive settlement concerning some fundamental but rarely explicated issues concerning the balance of power between state and market, regulator and public (Goodwin and Spittle, 2002). The terms 'citizen' and 'consumer'

are variously understood and performed by different stakeholders--each with their different objectives. Typically, they pass as ordinary and are rarely challenged precisely because of their everyday familiarity. As Born (2004: 500-1) observes, issues that surely require interpretation 'appear simply as articles of faith' in Ofcom's public statements.

Indeed, the ambiguity of 'consumer' and 'citizen' points to the strategic nature of these terms; it allows for some surprising alignments and unanticipated contradictions in positions advocated by different stakeholders or even the same stakeholder in different contexts. Examples include crediting the market with delivering citizen interests, for 'free and competitive markets deliver not just consumer benefits but also wider social objectives' (Carter, 2004b), the industry's concern that consumer choices damage long-term market interests, industry arguing for regulation to deal with 'rogue' industry players in new markets; public service charged with achieving popular appeal, and vulnerable groups claimed as both consumer and citizen concerns.

On the other hand, the flexibility of these terms, and the instability of their alignment with other polar terms is problematic for Ofcom. Thus, Ofcom (2005, p.39) announced a new work area for 2005/6, namely to:

'Identify and articulate more clearly how the interests of citizens should be incorporated in Ofcom's decision-making process in a transparent and systematic way.'

In parallel, Ofcom's Consumer Panel (2005) began rethinking its remit, 'building citizen considerations into our work' insofar as the needs of marginalised groups are defined as a citizen issue. The Consumer Panel aims to address 'important questions ... which are about access – or the lack of it – to communications that arise because of where people live, or because of who they are. We call these "issues about people as citizens".' This muddies the settlement that citizen issues would be left to the Content Board (which is, notably, subordinate to rather than independent of, Ofcom's Main Board).

Thus, the early years of Ofcom's activities involved a rethinking, and a broadening, of 'the citizen interest' to include issues of access and inclusion, vulnerable groups and the universal service obligation, as well as content issues concerned with public value, independence, quality and diversity (Richards, 2003). If consumer issues can no longer be restricted to telecoms,

nor citizen interests be restricted to broadcast content, and if the Consumer Panel and Content Board have converging remits, it seems that the Communications Act's framing of Ofcom's general duties did not, after all, offer a 'future-proof' framework for a converged communications sector.

Just words?

We have suggested that the particular but still-shifting take on 'citizens' and 'consumers' asserted by Clause 3 (General Duties of Ofcom) of the Communications Act 2003 lies at the heart of struggles to define the new regulatory regime for the communications sector. While the Communications White Paper defined Ofcom's purpose in terms of the interests of 'consumers', the 'public' and 'citizens', the Draft Bill used the term 'customer' throughout; the Bill replaced this with 'consumers'; finally, the Act used the twin terms 'citizens' and 'consumers'. Once established, Ofcom promptly hyphenated the terms, linking the previous and new terminology thus: 'Ofcom exists to represent the interests of the viewer and the listener. The citizen-consumer in Parliamentary language' (Carter, 2003a). Does this elision of terms matter? Lord Puttnam's Joint Committee Report (2002, p.11) asserted that 'this is more than a matter of semantics'. But what is it a matter of? Is the citizen-consumer 'a new kind of balancing act envisaged between market relations and civic interest' (Corner, 2004, p.898)? Or has Ofcom become 'the cheerleader' for 'the dominant market rhetoric of competition' (Harvey, 2006), with the citizen as the loser (Redding, 2005)? Although as already noted, this story is far from resolved, we offer the following interpretations by way of conclusion.

First, these discursive debates have contributed to shifting 'the public', however conceived, to the centre of the new regulatory framework. This in turn is part of the broader agenda of rolling back centralised regulation, devolving regulation to individuals (Chapman et al. 2003; Livingstone et al, in press). Some regard this optimistically, since the shift allows for more public responsibility, choice and participation, and since it requires a more transparent and accountable regulator. Some are even optimistic about a shift from citizens to consumer, seeing it as ushering in a politics of identity and entitlement (Scammell, 2000), allowing hitherto marginalised groups to advance new social agendas (Keum et al, 2004). Others, however, are more pessimistic, regarding these shifts as mere publicity, part of the 'supermarket state' (Christensen and Laegreid, 2000), promoting

an illusion of transparency and accountability (Freedman, 2005; Redding, 2005), while rendering the relations of the regulator to the industry less visible (Ryan, 2000) and further excluding marginalised groups (Purvis and Hunt, 1999). In the academy, critical voices outweigh the optimists: Rose (1999: 385) critiques the neo-liberal project by which governance functions through 'autonomy', 'empowerment' and 'choice', and which activates an individualistic and instrumentalist framework for citizens positioned as consumers rather than as members of a civic community (Harrison, 1999; Needham, 2003).

Second, through such debates, some issues are brought to prominence and others are rendered less visible. Certain new values have been successfully asserted as primary – choice, diversity, transparency – whose implementation places the regulator at the centre of developments (as the regulator of a converged, self-regulatory market) rather than, as before, the major players (such as the BBC and BT). These values favour public scrutiny of regulatory process (accountability, participation, etc.) over the public evaluation of regulatory outcomes, and they facilitate holding the debate in terms (e.g. 'furthering the consumer interest') at one remove from the activities of particular institutional structures (e.g. the Content Board or Consumer Panel). New initiatives can be conceived: for example, once the citizen interest is separated from public service broadcasting, the funding for the latter can be redistributed (as in the proposal for a Public Service Publisher; Ofcom, 2005). Alternative issues – for example, over the power of the BBC and BT, or whether Ofcom should be primarily an economic regulator, or the strength of the industry lobby in shaping Ofcom's role – have received surprisingly little public attention. Doubtless key influences shaping the emerging regulatory agenda will escape the public scrutiny enabled by establishing a new discourse, remaining instead behind the scenes, off the record – this including inaccessibility to the researcher's gaze. An obvious example, nowhere explained in the public record, is the replacement of the terms 'citizen', 'consumer' and 'public' by 'customer' in the Draft Bill.

Thus, in evaluating the significance of the Clause 3 debate, we must also imagine how things could have been otherwise. One way in which matters could be arranged differently is illustrated by the alternative discourse of the BBC. Contrary to the language of 'citizens' and 'consumers', at the BBC Media Centre, the writing on the wall says, 'Audiences are at the heart of everything we do'. In

the discursive struggle over 'values', the BBC promotes notions of 'building public value' and 'connecting communities', both to be delivered through the services (broadcast and otherwise) that they provide for 'audiences' (along with other collective nouns, 'public' and 'community'). BBC Chairman Michael Grade (2005) has argued:

'[It] is the BBC's duty to reflect the world back to UK audiences. To open windows on the world for all its audiences. To enable all its audiences to understand the world and its concerns and opportunities. And maybe even to encourage all its audiences to engage with those concerns and opportunities'.

Here concisely stated is the traditional view that the audience – initially passive and ignorant - is distanced from the world, requiring broadcasting to bridge the gap and so transform the audience (if possible, note his 'maybe even') into a knowledgeable and engaged public (c.f. Livingstone, 2005). Broadcasting, for the BBC, has a key role to play in stemming, or reversing, the cultural decline of the contemporary era. Ofcom's world of citizens and consumers is very different - a world of media-savvy individuals who are already competent agents in the world, ready to take responsibility for their own choices and actions. It is they, not the regulator, who specify the needs and wants that broadcasting will then supply, and while they may, on occasion, require the regulator's help in avoiding consumer detriment or social exclusion and ensuring media literacy, they do not require it to define their values or build their communities. In the context of debates about the citizen-consumer, the definition of 'risk' remains ambiguous: the role of Ofcom is to manage risks in the communications sector that affect individuals along with those that harm society.

Last, we note that effecting regulatory change through discursive means introduces its own constraints. One such concerns the term 'citizen'. Notably, once 'the citizen interest' had been placed on the agenda in its everyday rather than its restrictive, legal sense, one could hardly publicly argue against it, as Bill Bush, then Tessa Jowell's special advisor, observed (2005). Any opposition had to be coded, for example by arguing that the consumer interest already encompasses the citizen interest, or that the market can be relied upon to meet citizen interests, both these arguments being put forward by the industry and Ofcom during the passage of the Bill. However, once the citizen interest was included in the Act, it became a central feature of Ofcom's

activities, legitimating a crucial route for civil society (and the State) to hold the regulator to account. In so doing, it is perhaps problematic that to date there has been an intriguing absence of public discussion regarding the definition of 'citizen', notwithstanding the considerable academic literature on citizenship and communication (e.g. Lewis et al, 2005; Murdock, 2005; Purvis and Hunt, 1999).¹² In retrospect, it may have been useful for both the regulator and civil society to have explicated the intended meaning of this term. But it may also be that forcing a public debate over the precise nature of the citizen interest would have generated sufficient semantic disarray as to undermine the very case for its inclusion. Consequently, the definition of the citizen interest remains to subsequent interpreters of the Act – including Ofcom, civil society and the academy – in a debate that is only just beginning.

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Endnotes

¹ The statutory duties and responsibilities of Ofcom (established by the Office of Communications Act 2002) were set out in the Communications Act 2003, although as a shadow organisation Ofcom began its work earlier that year. According to its website, at 31 March 2005 Ofcom had 753 employees and 30 secondees from the DTI. Retrieved from

http://www.ofcom.org.uk/about/accoun/reports_plans/annrep0405/opfin/?a=87101

² These are the Independent Television Commission, Broadcasting Standards Commission, Radio Authority, Radiocommunications Agency and Office of Telecommunications.

³ See Consultation (30/11/98). Retrieved 13/7/05 from

<http://www.publications.parliament.uk/pa/cm200001/cmselect/cmcmds/161/16103.htm#n13>

⁴ Retrieved 17/7/05 from

http://www.communicationswhitepaper.gov.uk/pdf/index_responses_a-c.html

⁵ See summary of responses, retrieved 1/7/05 from

http://www.communicationsbill.gov.uk/pdf/response_OFCOM.pdf

⁶ See <http://www.communicationsbill.gov.uk/responses/CBI%20submission.doc>

⁷ See summary of responses, retrieved 1/7/05 from

http://www.communicationsbill.gov.uk/pdf/response_OFCOM.pdf

⁸ [http://www.parliament.the-stationery-](http://www.parliament.the-stationery-office.co.uk/pa/jt200102/jtselect/jtcom/169/169.pdf)

[office.co.uk/pa/jt200102/jtselect/jtcom/169/169.pdf](http://www.parliament.the-stationery-office.co.uk/pa/jt200102/jtselect/jtcom/169/169.pdf). See also Puttnam (2005).

⁹ The Communications Bill (November, 2002;

<http://www.communicationsbill.gov.uk/>), Retrieved from <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmbills/006/03006.1-6.html>

¹⁰ Report stage of the passage of the Bill, House of Lords, 23 June 2003. Retrieved 25/6/05 from

<http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030623/text/30623-04.htm>

¹¹ *The Communications Act*. Retrieved 25/6/2005 from <http://www.opsi.gov.uk/acts/acts2003/20030021.htm>. See also <http://www.communicationsbill.gov.uk/history.html>.

¹² A 'Generic Framework on Communication Rights' is under development by citizen activist groups; retrieved 3/1/05 from <http://www.apcwomen.org/rio/presentations/CRIS%20GGP%20Framework.doc>